

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON DIVISION

MARVIN SMITH,

Petitioner,

v.

CIVIL ACTION NO. 2:10-cv-00870

GEORGE JANICE, Warden,
McDowell County Correctional Center,

Respondent.

MEMORANDUM OPINION & ORDER

Pending before the court is the petitioner's Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 [Docket 1] and the petitioner's Application to Proceed Without Prepayment of Fees and Costs [Docket 5]. This action was referred to the Honorable Mary E. Stanley, United States Magistrate Judge, for submission to this court of proposed findings of fact and recommendation for disposition, pursuant to 28 U.S.C. § 636(b)(1)(B). The Magistrate Judge has submitted findings of fact and recommended that the court dismiss the Petition, without prejudice, for failure to exhaust state court remedies, and deny, without prejudice, the petitioner's Application to Proceed Without Prepayment of Fees and Costs.

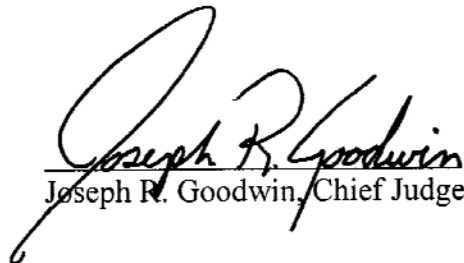
Neither party has filed objections to the Magistrate Judge's findings and recommendation.

The failure to object to a magistrate judge's report may be deemed a waiver of appeal of the substance of the report and the court need only satisfy itself that there is no clear error on the face

of the record in order to accept the recommendation. *See Camby v. Davis*, 718 F.2d 198, 200 (4th Cir. 1983); *Campbell v. United States D. Ct. N.D. Cal.*, 501 F.2d 196, 206 (9th Cir. 1974). The court has reviewed the Magistrate Judge's findings of fact and recommendations and finds no clear error on the face of the record. Therefore, the court accepts and incorporates herein the findings and recommendation of the Magistrate Judge and orders judgment consistent with the findings and recommendations. The court **DISMISSES** the Petition [Docket 1] without prejudice, **DENIES** without prejudice the petitioner's Application to Proceed Without Prepayment of Fees and Costs [Docket 5] and **DIRECTS** this action to be removed from the docket.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: March 4, 2011


Joseph R. Goodwin, Chief Judge